

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

Docket No. 1,060,610

ORDER

Claimant requests review of the November 5, 2012, Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. John D. Jurcyk, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the following: The telephonic sworn statement of Mike Bradshaw dated May 30, 2012; The telephonic sworn statement of Jason Jellison dated May 31, 2012; Preliminary Hearing transcript dated June 4, 2012, with exhibits attached; Preliminary Hearing and Motion to Compel the Attendance of Witnesses transcript dated September 10, 2012; and Preliminary Hearing transcript dated November 5, 2012.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for temporary total disability and payment of outstanding medical bills after finding claimant failed to prove by

“clear and convincing evidence”¹ that his impairment did not contribute to his injury. Claimant had tested positive for marijuana metabolite, substantially above the limits set in K.S.A. 2011 Supp. 44-501(b)(A-D).

The claimant requests review of whether the ALJ erred in admitting and considering evidence of impairment that lacked the foundation required by K.S.A. 44-501, and whether claimant sustained his burden of proof by “clear and convincing evidence” that any impairment did not contribute to his injury. Claimant has not filed a brief in support of his application for review of the ALJ's Order.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed, although on other grounds.

Claimant worked for respondent as a daylight driller. He was in charge of the day to day duties on the rig. He was paid \$20.50 an hour and worked an average of 48 hours a week.

Claimant testified that on April 11, 2012, there was a second crew on his shift because the rig was being moved. Claimant and Jason Jellison, a co-worker, got into an argument about digging a rat hole ditch and a ditch down the center of the sub to drain off the excess oil. Claimant wanted the ditch in one spot and Jason wanted it in another. There was a verbal confrontation that turned physical, punches were thrown and claimant lost his balance during the fight, slipped on some oil and fell.

Claimant felt immediate pain in his left leg when he fell and was taken to Jetmore Hospital for treatment. He was diagnosed with a fractured hip. He is being treated with Dr. Alexander Neel. Claimant is unable to work at this time because he can hardly use his left leg. At the time of the June preliminary hearing, claimant was just starting to put weight on his leg.

When claimant arrived at the emergency room he was drug tested per company policy. This is required whenever an employee is involved in an accident. Claimant tested positive for marijuana at a level of 216 ng/ml. Claimant was not injured because of a marijuana impairment, but because he slipped and fell on some oil during the altercation. He was however over the limit allowed by statute.

¹ ALJ Order (Nov. 5, 2012).

Mike Bradshaw testified via telephone. His job for respondent is as a relief driller. On April 11, 2012, claimant was talking with another employee named Jason Jellison about something that wasn't done right and the two got into an argument that turned physical. Mr. Bradshaw testified that the altercation began on the staircase and went to the floor of the rig.

Mr. Bradshaw is not sure who started the fight, but felt that it was more Jason's fault because he should have swallowed his pride and done the job he was being asked to do. by claimant.

Mr. Bradshaw testified that he was trying to hold claimant and Jason apart. But, as the two were exchanging empty punches claimant slipped and fell onto the 60 foot long, 28 to 33 foot wide metal floor. Mr. Bradshaw thought claimant slipped on some oil which caused him to lose his balance and fall. Claimant was taken to the emergency room because of the injury to his leg. It was discovered claimant had broken his hip.

Earlier in the day Mr. Bradshaw and claimant rode into work together. He did not notice claimant having any trouble driving or speaking. Claimant did not have slurred speech or any trouble with his coordination. At no time did he see claimant ingest marijuana. There were no indications that claimant was under the influence of marijuana.

Jason Jellison is claimant's brother-in-law. On April 11, 2012, Mr. Jellison was working on the rig with claimant. They had a discussion over the placement of a ditch hole that escalated into an argument and then into a shoving match. Mr. Jellison testified that he was the one who started the shoving. He had no intention of injuring claimant and considered him to be a friend. He agreed with claimant's statement that claimant was acting in self defense. Mr. Jellison testified that there is always debris and residue on the floor of the rig so it is possible for someone to lose their balance.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501(b)(1)(A-D) states:

(b) (1) (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

(B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or

medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

Confirmatory test cutoff levels (ng/ml)	
Marijuana metabolite ¹	15
Cocaine metabolite ²	150
Opiates:	
Morphine.	2000
Codeine.	2000
6-Acetylmorphine ⁴	10 ng/ml
Phencyclidine.	25
Amphetamines:	
Amphetamine.	500
Methamphetamine ³	500

¹ Delta-9-tetrahydrocannabinol-9-carboxylic acid.

² Benzoylecgonine.

³ Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

⁴ Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

K.S.A. 2011 Supp. 44-501(a)(1)(E) states "Compensation for an injury shall be disallowed if such injury to the employee results from: . . . the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise."

The ALJ and the parties focused this argument on claimant's positive urine test. However, the above statute more appropriately determines this situation. Claimant was involved in a fight with a co-employee. The above new statute clearly precludes the award of benefits when a workplace fight leads to an injury. Here, claimant is prohibited from collecting benefits due to the circumstance leading to the injury. Claimant was in a fight. Benefits are statutorily prohibited. The denial of benefits to claimant is affirmed, although on other grounds.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant was involved in a work place fight with a co-worker. By statute, claimant is precluded from collecting workers compensation benefits. The denial of benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated November 5, 2012, is affirmed, although on other grounds.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge

² K.S.A. 2011 Supp. 44-534a.